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No. 313

# In the Supreme Court of the United States

OCTOBER TERM, 1957

L. B. BINION, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 15) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1957. (Pet. 16.) The petition for a writ of certiorari was filed on July 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

### QUESTION PRESENTED

Whether Section 3616 (a) of the Internal Revenue Code of 1939 applies to income tax returns.



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## STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

## STATEMENT

Petitioner was charged in two indictments, filed in the United States District Court for the Northern District of Texas on October 3, 1952 and June 8, 1953, with eight counts of wilfully attempting to evade the income taxes of himself and his wife by filing false returns for the years 1945 through 1948. (R. 6–8, 100–105.) On September 5, 1953, petitioner entered pleas of guilty in the United States District Court for the Western District of Texas (after his motion for change of venue had been granted) to four counts, those involving his returns and his wife's separate returns for 1947 and 1948. (R. 4–5, 91–93, 136–138.)

On December 14, 1953, he was sentenced to concurrent five-year prison sentences on three of the counts and fined $5,000 on each. On the remaining count, he was fined $5,000 and sentenced to a consecutive five-year prison term, execution of which was suspended on condition that the fines be paid within 90 days. (R. 93–94, 138–140.)

On September 22, 1956, petitioner moved for correction of his sentence in the District Court, relying upon *Berra* v. *United States*, 351 U. S. 131, for the proposition that he should have been sentenced under Section 3616 (a) of the Internal Revenue Code of 1939 rather than under Section 145 (b). This motion was denied on September 28, 1956. (R. 143–146.) The Court of Appeals affirmed that denial on the authority of *Achilli* v. *United States*, 353 U. S. 373. (Pet. 15.)

## ARGUMENT

Petitioner urges that the sentence imposed upon him under Section 145 (b) of the Internal Revenue Code of 1939 was excessive; that he should have been sentenced under Section 3616 (a) of the Code which, contrary to the holding of this Court in *Achilli* v. *United States*, 353 U. S. 373, does apply to income tax returns; and that the Court should re-examine its decision in that case. There is nothing of any substance in the petition which was not thoroughly canvassed in the briefs and the petition for rehearing filed in the *Achilli* case, and in *Costello* v. *United States*, 353 U. S. 978.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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RICHARD B. BUHRMAN,
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AUGUST 1957.